Filed 6/12/07 In re N.L. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re N.L. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY DEPARTMENT OF CHILDREN'S SERVICES, Plaintiff and Respondent, v. J.L. et al., Defendants and Appellants.	E040543 (Super.Ct.Nos. J205462 & J205463) OPINION
In re J.L. on Habeas Corpus.	E041837 (Super.Ct.Nos. J205462 & J205463

APPEAL from the Superior Court of San Bernardino County. Robert Fowler, Temporary Judge. (Pursuant to Cal. Const., art VI, § 21.) Affirmed.

ORIGINAL PROCEEDING; Petition for writ of habeas corpus. Robert Fowler, Temporary Judge. (Pursuant to Cal. Const., art VI, § 21.) Petition denied.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant J.L.

Diana W. Prince, under appointment by the Court of Appeal, for Defendant and Appellant A.L.

Ruth E. Stringer, Acting County Counsel, and Dawn M. Messer, Deputy County Counsel, for Plaintiff and Respondent.

Konrad S. Lee, under appointment by the Court of Appeal, for Minors.

J.L. (Father) and A.L. (Mother) appeal from the juvenile court's order following the jurisdictional/dispositional hearing.[1] Father claims the court violated his right to due process by conducting the hearing in his absence, the court erred in failing to obtain a waiver from him pursuant to Penal Code section 2625, and his counsel was ineffective. In addition to the appeal, Father filed a petition for writ of habeas corpus reasserting his claim that his counsel was ineffective. We received a response from the San Bernardino County Department of Public Social Services (Department). Father filed a reply to the Department's response.

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[1] Mother filed a notice of joinder in the arguments raised in Father's opening brief and his Petition for Writ of Habeas Corpus. However, Mother does not allege that she was denied due process or statutory rights, nor does she claim that she was denied effective assistance of counsel. Instead, she alleges that Father was denied his statutory and due process rights and he was denied the effective assistance of counsel. An appellant may only contest such orders that injuriously affect him or her. (*In re Devin M.*

[footnote continued on next page]

I. PROCEDURAL BACKGROUND AND FACTS

On December 14, 2005, N.L. (born April 2005) and S.L. (born January 2000) were taken into protective custody by the Department, following the service of a search warrant by the police. Officers found marijuana and methamphetamine, along with the ingredients and materials used to manufacture methamphetamine. There was a loaded gun in the hallway closet, another gun in the back seat of the vehicle parked in the driveway, and a large unsheathed machete on top of a dresser in the master bedroom. The home was filthy with clothes, boxes, toys and tools, which made it difficult to walk around inside. The children were unable to sleep in their rooms due to the amount of clutter, and S.L.'s crib had a BB gun in it. There were piles of trash in the kitchen, no food in the refrigerator, and old food on the countertops. Both parents were arrested.

On December 16, 2005, the Department filed petitions on behalf of the children pursuant to Welfare and Institutions Code section 300, subdivisions (b) and (g).[2] Three days later, the trial court detained the children and placed them in the Department's care. Both parents were ordered to drug test. Mother's test resulted in drugs being detected, Father tested positive for amphetamine and methamphetamine. On December 30, 2005, Father was arrested for having an outstanding warrant. In the process of searching him in

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[footnote continued from previous page]
(1997) 58 Cal.App.4th 1538, 1541.) Accordingly, we find that Mother lacks standing to raise Father's issues on appeal. (*In re Frank L.* (2000) 81 Cal.App.4th 700, 703.)

[2] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

jail, police also found methamphetamine hidden in his sock. He was charged for bringing a controlled substance into jail.

In its jurisdictional/dispositional report, the Department recommended that the allegations in the petition be sustained and that both parents be ordered to participate in family reunification services. On January 9, 2006, at the jurisdictional/dispositional hearing, the matter was set as contested on behalf of Father. Father's initial counsel of record was relieved due to a conflict, and on February 14, Michael Clark was appointed to represent Father. The hearing was continued to allow Mr. Clark an opportunity to speak with Father.

On March 13, 2006, at the contested jurisdictional/dispositional hearing, Father was not present and was still incarcerated. Mr. Clark asked for a continuance of the hearing, stating, "I was informed this morning that [Father] had an incident [in custody], where he got into a fight, and I was told [by the bailiff] that he's now refusing to come to court." The court then stated, "So the facts are straight, the record is clear, apparently he didn't have the fight today. It was before. He's refusing to come to court today; is that correct?" The bailiff replied, "That's correct." The court then denied the request for a continuance and proceeded with the hearing.

The Department offered the social worker's reports into evidence. Neither parent objected. Father's counsel did not offer any affirmative evidence; however, he reserved the right to call the social worker. Mother's counsel called the social worker to the stand. The social worked testified that the section 300 petition allegations were based on the police report, pictures of the home taken by the police, and the positive drug tests of both

parents and S.L. Mother testified that the home was not messy when the police arrived. Instead, she blamed the police for the mess by throwing items around the house. Mother admitted to keeping a gun in the home, but she claimed that it was kept out of reach of the children. She stated that she did not know who owned the machete, and she claimed she did not know where it came from. Mother disputed "[a]bout 95 percent of the [police] reports" and contended that the police planted drug paraphernalia around the home because she was in the process of filing a suit against the Department of Motor Vehicles for previously raiding their home. Mother denied making a statement to the police that she used marijuana frequently or that she had taken Oxycodone. She also claimed there were no amphetamines in the home, and she was unaware that Father used methamphetamine in the home. However, she was unable to explain why both she and S.L. tested positive for the drugs.

In addition to not presenting any affirmative evidence on behalf of Father, Mr. Clark did not cross-examine the social worker. Mr. Clark did, however, deny all allegations on the Father's behalf. During closing arguments, Mr. Clark indicated that Father objected to the section 300 petitions. The juvenile court found Father to be a presumed father of the children, sustained the allegations in the petitions as amended, declared the children to be dependents of the court under section 300, subdivisions (b) and (g), ordered reunification services, and transferred the matter to Orange County.[3] The children were to be maintained with the paternal grandparents.

[3] Mother had moved to Orange County, California.

II. DENIAL OF CONTINUANCE OF HEARING

Father contends the juvenile court violated his due process rights by refusing to continue the jurisdictional/dispositional hearing and proceeding in his absence. He argues that the record shows he had attended court hearings wherein he indicated his intent to contest the proceedings and testify on his own behalf. Although this particular hearing had been previously continued from January 9 to February 14, and then to March 13, 2006, Father notes that no prior continuance was sought for his appearance. He faults his counsel and the court for relying on the representation of the bailiff that Father refused to be transported without investigating as to whether he was "in a physical condition that made him able to be transported."

In *In re Axsana S.* (2000) 78 Cal.App.4th 262, 268-270 (*Axsana S.*), overruled on another point in *In re Jesusa V.* (2004) 32 Cal.4th 588, 624, fn. 12 (*Jesusa V.*), the court held an incarcerated parent does not have a due process right to be present at dependency proceedings involving his or her children, so long as the parent has meaningful access to the court through appointed counsel. Similarly, in *D. E. v. Superior Court* (2003) 111 Cal.App.4th 502, 513, the court held, "Conducting a dispositional hearing in the absence of an incarcerated parent who has expressed a desire to be present may violate a statutory right, but not a due process right. [Citation.] As long as the parent has meaningful access to the court through appointed counsel, there is no due process violation. [Citation.]" In *Jesusa V.*, the California Supreme Court cited *Axsana S.'s* due process holding with approval, concluding due process does not demand the incarcerated parent's personal appearance. "[N]o denial of due process has been found where the prisoner-parent is

unable to attend because he or she is in the custody of another state or the federal government and is instead represented by counsel. [Citation.]" (*Jesusa V.*, *supra*, 32 Cal.4th at p. 626.)

Here, we cannot find any violation of Father's due process rights, nor can we find that the trial court abused its discretion in denying the request to continue the hearing. (§ 352, subd. (a) [Continuances in dependency cases are allowed only upon a showing of good cause and may not be granted if they are contrary to the interests of the minor.]; *In re Karla C.* (2003) 113 Cal.App.4th 166, 179-180 ["The court's denial of a request for continuance will not be overturned on appeal absent an abuse of discretion."].) Father was present at the prior jurisdictional/dispositional hearing when the trial court continued the matter to allow Mr. Clark time to become familiar with the facts of the case. He was properly notified of the continued hearing date; however, on that date, Father voluntarily refused to attend the hearing.

Although Father claims the juvenile court should have investigated whether or not he was physically able to appear in court, we reject such contention. First, we note that Father offers no evidence other than mere speculation that it was physically impossible for him to appear in court. Second, as the Department points out, the juvenile dependency statutory scheme requires that section 300 petitions be heard and decided expeditiously. (§ 352, subd. (a).) Here, the jurisdictional/dispositional hearing had already been continued twice, or 63 days. Finally, Father was adequately represented at the hearing by his attorney.

III. FATHER'S ABSENCE FROM THE HEARING

Penal Code section 2625, subdivision (d), in effect, provides that when an incarcerated parent has expressed his or her desire to attend a dependency hearing and the trial court has issued an order for the production of that parent, the court may not proceed "without the physical presence of the prisoner or the prisoner's attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner or an affidavit signed by the warden, superintendent, or other person in charge of the institution, or his or her designated representative stating that the prisoner has, by express statement or action, indicated an intent not to appear at the proceeding."

Father contends that he had an absolute right to be present at the jurisdictional/dispositional hearing under Penal Code section 2625. He claims he had information that he wished to share with the court to assist the court in making its decision. Although his counsel was present, Father contends, "no affirmative evidence was presented at the hearing on behalf of [him], nothing was offered to stand in lieu of [his] testimony, and [his] counsel did not cross-examine the social worker." Other than Father's claim that the section 300 allegations were "baseless and precipitated by the parents being the objects of police harassment," he fails to enlighten us as to the specifics of this information. Moreover, we note that such claim was presented to the juvenile court at the detention hearing.

Although father had a statutory right to attend the adjudication of the dependency petition with his attorney, as we previously stated, his presence was not constitutionally required, and thus, his absence did not deprive the juvenile court of jurisdiction to

proceed. (*Jesusa V., supra*, 32 Cal. 4th at pp. 624-626.) Nonetheless, even if we assume the juvenile court erred in failing to obtain a waiver as required by Penal Code section 2625, we find the error to be harmless. Father's presence at the hearing would not have altered the fact that he was currently incarcerated, he had tested positive for amphetamines when he was arrested, and he later tested positive for amphetamine and methamphetamine as a result of a court-ordered drug test. In view of the facts that Father's attorney was present at the hearing and that Father has failed to identify any evidence or arguments that he would have presented to the juvenile court, we must conclude that his involuntary absence from the proceedings was harmless error. (*Jesusa V., supra*, 32 Cal.4th at pp. 624-626.)

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Father contends he was denied the effective assistance of counsel because his attorney failed (1) to meet with him to prepare his case, (2) to investigate and challenge the failure to transport him to court, and (3) to present a meaningful case on his behalf challenging any of the findings and orders recommended by the Department.

"To establish ineffective assistance of counsel in dependency proceedings, a parent 'must demonstrate both that: (1) his appointed counsel failed to act in a manner expected of reasonably competent attorneys acting as diligent advocates; and that (2) this failure made a determinative difference in the outcome, rendering the proceedings fundamentally unfair in that it is reasonably probable that but for such failure, a determination more favorable for [the parent's] interests would have resulted.' [Citations.] In short, [Father] has the burden of proving both that his attorney's

representation was deficient and that this deficiency resulted in prejudice. [Citation.]" (*In re Dennis H.* (2001) 88 Cal.App.4th 94, 98.)

First, there is no evidence, but only Father's bald assertion, that Mr. Clark failed to meet with him in preparation for the hearing. Regarding the failure to investigate Father's absence, Father suggests that Mr. Clark should have challenged the bailiff's representations. However, Father offers no evidence to support any reason why such representations were inaccurate. At the hearing itself, Mr. Clark's representation of Father was limited by the overwhelming evidence which supported the Department's allegations. Second, there is no reasonable likelihood of a different result. Even if Father had not given up his right to attend and defend at the jurisdictional/dispositional hearing, he had no meritorious defense, and thus, he cannot show prejudice. Turning to the record, we note that Mother was present at the hearing and testified to the same claim of police harassment that Father claimed. She challenged the allegations in the petitions claiming the police caused the home to be messed up. She denied Father's use of drugs in the house. She feigned ignorance as to how she or her child could have tested positive for amphetamines. In a nutshell, she made the case for both herself and Father. He offers nothing new.

In the absence of any ability to demonstrate prejudice, Father's claim of ineffective assistance of counsel must fail.

V. PETITION FOR WRIT OF HABEAS CORPUS

Recognizing that the proper method to raise an ineffective assistance of counsel claim is by writ of habeas corpus, not appeal, Father has filed a separate petition for writ

of habeas corpus which is supported by (1) a declaration by his appellate attorney stating Father's trial attorney failed to respond to appellate counsel's inquiries, and (2) a declaration by Father which discusses his version of what occurred in the case.

In his petition, Father advances the same claims of ineffective assistance of counsel raised in his appeal. The only difference is that Father offers his self-serving declaration stating that he never met with Mr. Clark to discuss his case and that he was hospitalized on March 13, 2006, and did not refuse to come to court. Although Father's appellate counsel was unable to speak with Mr. Clark, there is nothing in the record to suggest that he could not obtain hospital records or declarations from prison officials to support Father's claim. Under the circumstances in the instant case, we conclude the representation by Father's attorney was not unreasonably deficient and, even if it was, it is not reasonably probable the result would have been any different.

VI. DISPOSITION

The orders are affirmed and the petition for writ of habeas corpus is denied.

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HOLLENHORST
Acting P. J.

We concur:

GAUT
J.

MILLER
J.